IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.232 OF 2007

1. Marwah Steels Pvt. Ltd.,
   a company registered under
   the Companies Act, 1956
   having its office at
   Marwah Centre, Marwah
   Estate, Krishanlal
   Marwag Marg, Andheri(E),
   Mumbai-400 072.

2. Mr. Raj Marwah,
   Director,
   Marwah Steels Pvt. Ltd.,
   having his office at
   Marwah Centre, Marwah
   Estate, Krishanlal
   Marwag Marg, Andheri(E),
   Mumbai-400 072. .... Petitioners

- Versus -

1. Union of India,
   Aykar Bhavan,
   New Marine Lines,
   Mumbai-400 020.

2. The New India Assurance
   Co. Ltd., a company
   registered under the
   Companies Act, 1956 and
   a wholly owned Government
   insurance company having
   its office at New India
   Assurance Bldg., 87,
   M.G. Road, Fort,
   Mumbai-400 001. .... Respondents

Sarvasri D.D. Madon, Senior Advocate with
Karl Shroff, Advocate i/b M/s. Pardiwalla
& Co. for the Petitioners.

Mrs. Gaikwad, Advocate, for the Respondent
No.1.

Sarvasri Asim S. Vidyarthi with S.S. Vidyarthi,
Advocates i/b S.M. Vidyarthi for the Respondent
No.2.

CORAM: R.M.S. KHANDEPARKAR &
D.G. KARNIK, JJ.

DATED: OCTOBER 05, 2007

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. Rule. The learned Advocates appearing for the respondents waive service. By consent, rule made returnable forthwith.

2. By the present petition, the petitioners while challenging the decision of the respondent No.2 to treat the Policy Nos.111100/11/04/00831 and 111100/11/05/00800 as policies based on market value basis, seek direction to the respondent No.2 to sanction the petitioners' claim on reinstatement value basis and to continue to treat the said policies to be issued on reinstatement value basis.

3. The petitioners submitted the proposal for Standard Fire and Special Perils Policy to the respondent No.1 on 15-9-2003 pursuant to which the respondent No.2 issued Policy bearing No.1111/11/03/00852 for a period commencing from 15-9-2003 till 14-9-2004 insuring the petitioners' building known as "Marwah Centre", Marwah Estate, K.M. Marg, Andheri (East), Mumbai together with the plant and machineries, equipments, electrical

installations, etc., for a total sum of Rs.18,00,00,000/- against fire, earthquake, flood and other risks as per the forms attached. On the expiry of the said policy, the same was renewed for another year, namely 15-9-2004 to 14-9-2005 being Police bearing No.111100/11/04/00831 by the respondent No.2.

4. On 26-7-2005 water inundated the petitioners' factory because of floods due to unprecedented rains in Mumbai causing damage to the petitioners' property. The petitioners thereupon informed the loss suffered by them to the respondent No.2 and submitted their claim in the prescribed form on 1-9-2005. The respondent No.2 appointed M/s. M.R. Jhalani & Associates as Surveyors to inspect the property and to assess the loss. On receipt of the report of the Surveyors, the respondent No.2 offered a sum of Rs.35,00,000/- for the loss or damage by the floods to the petitioners which have occurred on 26-7-2005. The said amount was duly received by the petitioners under the receipt dated 10-10-2005 being the payment of the Claim No.111100/11/0055/00057 under the Policy No.111100/11/04/00831.

5. On 24-11-2005 the petitioners addressed a letter to the respondent No.2 claiming that as against their claim for a total amount of Rs.71,93,017.84 the respondent

No.2 had released interim amount of Rs.35,00,000/-. They were therefore requested to settle their claim for releasing the balance amount of Rs.36,93,017.84 ps. A further letter was addressed by the petitioners to the respondents on 15-12-2005 stating that in their claim dated 24-11-2005, due to oversight, one bill of Dataxcess Integrated Technology Limited dated 28-10-2005 for Rs.40,539/- was not added in the claim and pursuant to the above addition, the total claim was to be Rs.72,33,556.84 ps. The respondent No.2, on the other hand, responded to the petitioners on 29-3-2006 that the gross loss assessed regarding the claim by the petitioners was Rs.71,99,206/- from which the depreciation to the extent of Rs.3,43,732/-, salvage amount of Rs.59,000/- and excess 5% to the tune of Rs.3,39,824/- were deducted and after further deduction of the amount of Rs.35,00,000/-, which was already paid, it was informed that the net balance amount payable was Rs.29,56,550/-.

6. The respondents accepted the said amount of Rs.29,56,550/- allegedly in full and final satisfaction and discharge of their claim under the Policy No.No.111100/11/04/00831. It was thereafter that the petitioners under the letter dated 11-4-2006 sought to dispute the disallowance of sum of Rs.3,43,732/- on account of depreciation and further informed the

respondent No.2 that their attention was drawn after filing the claim that their proposal for issuance of insurance policy clearly stated that the policy was to be on the reinstatement value basis. However, factually the policy document did not mention that the same was issued on reinstatement value basis. It was, therefore, requested by the petitioners to the respondents that the original proposal be called for and verified.

7. The respondent No.2 on their part refuted the claim of the petitioners under their letter dated 13-4-2006 informing that the loss has been assessed by the Surveyors as per the condition of the policy issued to the petitioners about which they were fully well aware and further that the petitioners had accepted the payment in full and final settlement of their claim and therefore, it was not possible to review their claim for further assessment or payment.

8. The petitioners, however, still persisted under their letter 27-4-2006 that their proposal form submitted by them required the policy to be on reinstatement value basis and that therefore the respondents should release the further amount of Rs.3,43,732/-. While rejecting the said claim, the respondent No.2 under their letter dated 16-5-2006 informed the petitioner that they had carefully examined

the entire issue and had noted that the policy was issued on market value basis and further that the said policy had run for two years prior to the incident which gave rise to claim the policy amount and yet at no point of time it was claimed by the petitioner that the policy was required to be corrected and issued on reinstatement value basis.

9. The petitioners still went on disputing the contention in that regard by the respondent No.2 and since the amount as claimed by them was not paid, the petitioners filed claim before the Ombudsman on 16-6-2006 which was rejected on the ground that the Ombudsman is empowered only to look into the grievances and complaints in respect of insurance policies taken out in individual capacity i.e. personal lien insurance and as the claim by the petitioners was not relating to such policy, it could not be entertained by the Ombudsman.

10. Thereafter, on 6-7-2006 the petitioners informed the respondent No.2 about the collapse of 100 feet long boundary wall due to heavy rains on 4-7-2006 and claimed an estimated loss of Rs.5,00,000/-. It appears that thereafter the claim was inflated to Rs.7,22,610/- and pursuant to the assessment done, the respondent No.2 paid a sum of Rs.4,38,991/-. The same amount was

accepted by the petitioners claiming to be partial settlement of their claim. In that regard, the respondent No.2 informed the petitioners that the amount was offered in full and final settlement of their claim and there is no question of accepting the amount as partial settlement. It was also informed that the amount of Rs.4,38,991/- was in full and final settlement of their claim relating to the loss arising out the collapse of the boundary wall and further it was informed that if the petitioners desired to get the policy on reinstatement value basis, then they could give their option at the time of renewal and it was not possible to settle the claim on reinstatement basis of then existing policy.

11. In the above facts and circumstances, the petitioners have filed the present petition seeking writ of mandamus for direction to the respondents to sanction the petitioners' claim on reinstatement value basis and further while quashing the decision of the respondent No.2, to treat the Policy Nos.111100/11/04/00831 and 111100/11/05/00800 to be the policies based on reinstatement value basis and further to continue to treat the petitioner No.1's policy as having been issued on reinstatement value basis.

12. From the above referred facts of the case, it is

apparent that there is a serious dispute between the parties as to whether the insurance policy issued to the petitioners by the respondent No.2 was on reinstatement value basis or on market value basis. Undisputedly, it appears from the copy of the proposal stated to have been forwarded by the petitioners to the respondents before obtaining the policy for the year 2003-2004 that they had applied for issuance of the policy on reinstatement value basis. At the same time, the copy of the policy which was issued in favour of the petitioners for the year 2003-2004 nowhere discloses to have been issued on reinstatement value basis. Besides, the said policy discloses to be subject to warranties and clauses as per the forms attached. However, the copy of the policy placed on record does have any such attached forms regarding the warranties and clauses. In the absence of any such clause relating to the basis on which the policy was issued is clear from the insurance contract between the parties, to assume that the policy was issued on reinstatement value basis would amount to re-writing the insurance contract between the parties by the Court which is clearly not permissible. **{vide: LIC of India and another v. S. Sindhu**, (2006) 5 SCC 258; **The Managing Director, Orix Auto Finance (India) Ltd. v. Shri Jagmander Singh and Anr.,** 2006 (2) SCC 598}.

13. It is further pertinent to note that even the

policy for the year 2004-2005 nowhere discloses on the face of it as having been issued on reinstatement value basis. What is further pertinent to note is that the letter dated 11-4-2006 for the first time refers to the claim of the petitioners that the policy which was issued to the petitioners was subject to reinstatement value basis. None of the correspondence prior to 11-4-2006 refers to any such issue having been raised by the petitioners in relation to the concerned policy with the respondent No.2. On the contrary, the letter dated 11-4-2006 clearly stated that:

> "In this connection we had drawn your attention **after filing the claim** that our insurance proposal clearly states that the policy to be issued is to be subject to reinstatement value."
>
> (Emphasis supplied)

By this letter, there is a clear admission on the part of the petitioners that even at the time of filing of the claim, after the incident of 26-7-2005, the petitioners had not claimed the policy to have been issued on reinstatement value basis. It was only "after filing such claim", that it was brought to the notice of the respondent No.2 that the insurance policy in favour

of the petitioners ought to have been issued on reinstatement value basis. It is also an undisputed fact that the petitioners were fully aware that the policy issued to them did not mention that the same was on the reinstatement value basis and yet there was no reaction of whatsoever nature in that regard by the petitioners till the actual claim was made pursuant to the incident of 26-7-2005. This obviously discloses that there are disputed question of facts which will require the adjudication thereof by the competent Court before arriving at the finding about the nature of the insurance policy and no writ in the nature asked for can be issued without such finding. On this ground alone, the petition is liable to be dismissed.

14. It is sought to be contended that the amount of Rs.35,00,000/- was accepted as the petitioners had no option than to succumb to the pressure of the respondent No.2 in the situation that prevailed pursuant to the loss suffered on account of the incident of 26-7-2005. Even assuming that the petitioners were hard pressed to accept the amount offered in the given situation, nothing prevented the petitioners from claiming that the policy ought to have been issued on reinstatement value basis, immediately after it was issued to them in the year 2003-2004. Similar is the case in relation to the year 2004-2005. One fails to understand what prevented

them from insisting for issuance of policy clarifying the basis on which it was issued and incorporating the same in the policy which was issued for two earlier years and what made them to wait till the actual calamity occured and the claim was required to be preferred based on the policy. This obviously discloses the necessity for adjudication of the disputed question of facts and no such exercise is permissible in writ jurisdiction. {vide: **Har Shankar and others etc. etc. v. The Deputy Excise and Taxation Commissioner and others,** AIR 1975 SC 1121, **Kulchhinder Singh and others v. Hardayal Singh Brar and others,** AIR 1976 SC 2216, **State of H.P. and others v. Gujarat Ambuja Cement Ltd. and another,** (2005) 6 SCC 499}.

15. In **State of U.P. v. Mohammad Nooh,** reported in AIR 1958 SC 86, while dealing with the scope of powers under Article 226 of the Constitution, it was held that if an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court’s sense of fair play, the superior court may, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first

instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity. Obviously, therefore, when the action is wholly without jurisdiction, interference in writ jurisdiction would be well justified. However, when the matter involves disputed questions of facts, and in the absence of adjudication thereof, circumstances, it is difficult to arrive at any finding as to whether the action is without jurisdiction or not, there cannot be any justification for interference in writ jurisdiction.

16. In **State of H.P. and others v. Gujarat Ambuja Cement Ltd. and another,** reported in (2005) 6 SCC 499, it was held that the rule of abstaining from interference in case of availability of alternative efficacious remedy, while dealing with a matter in writ jurisdiction, is essentially a rule of policy, convenience and discretion. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution but at the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High

Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction. It was further held that the Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted. It was further ruled that there are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. Neither of these circumstances exist in the case in hand. Added to this, there are disputed questions of fact involved in the matter.

17. For the reasons stated above, therefore, the petition is liable to be dismissed, leaving it open to the parties to get their dispute settled before the competent Court. The petition, therefore, is hereby

dismissed. The rule is discharged with no order as to costs.

(D.G.Karnik, J.) (R.M.S.Khandeparkar, J.)

sjs/rwpj232.7